PP

v.

TIMHAR JIMDANI ONG & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL TRIAL NO: K45-04-2006]
27 APRIL 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Prima facie case - Whether established - Possession of drugs - Whether accused in mens rea possession of drugs - Whether accused persons' claims of drugs belonging to a stranger named Safia an invention - Whether court unable to accept evidence of accused persons that they knew nothing about the drugs - Whether accused persons guilty of offence charged - Whether prosecution proved case beyond reasonable doubt - Death sentence - Whether passed*

The joint charged against the accused was for trafficking in a dangerous drug to wit 336.66 grams of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. At the close of the prosecution case, the court ruled that the prosecution failed to establish a *prima face* case against both of them and accordingly acquitted them of the charge. The public prosecutor appealed against the order of acquittal in respect of the trafficking charge which was allowed by the Court of Appeal. Both accused were ordered to enter their defence on the original trafficking charge. The salient facts were that on 11 August 2005 at about 10.50am, Inspector Willie had led a team of police officers to conduct a raid at room 808 of the Kinabalu Daya Hotel, Kota Kinabalu. When the door to room 808 was opened by the first accused, Inspector Willie had introduced himself as a police officer and upon hearing this the first accused tried to push back the door. The police team managed to keep it open and Inspector Willie and his team then entered the room. There were two occupants inside, namely the first accused and the second accused who were husband and wife and citizens of the Phillipines. Nothing incriminating was found on the body of the first accused but then a box bearing the label 'Sky Flakes Crackers' was discovered on the floor of the room. It was in an opened state and a pair of sports shoes and three pairs of lady sandals were inside which belonged to the second accused. Lance Korporal Karim examined the box and saw

A something suspicious at the underside of the box. He tore the box from inside and noticed a translucent plastic bag containing white crystalline substances. He then turned over the box and tore the bottom where he found nine plastic packets containing white crystalline substances suspected to be dangerous drugs. Inspector
B Willie testified as soon as the drugs were found that the second accused shouted and embraced the first accused and said in suluk (Filipion dialect) that the police had found the thing – 'Kia ba kan nila na.' The suspected drugs were sent to the chemistry department for analysis and was confirmed to contain 336.66
C grammes of methamphetamine.

In his defence, the first defendant submitted that he knew nothing about the drugs as the box belonged to a stranger who had asked him to keep it temporarily. His testimony was that on 6 August
D 2005, he and the second accused arrived at the Kota Kinabalu airport from Manila when a fellow Filipina by the name of Safia approached him and asked him to keep a box for her as she had to go to Sandakan. According to the first accused, he did not suspect that the box contained any dangerous drug. The first
E accused submitted that subsequently, Safia returned, opened the seal of the box and took out a black plastic bag. After taking out the black plastic bag she left and told the first accused she would later come back for the box. The first accused testified that during their entire stay at the hotel, he never approached anybody to
F negotiate any sale of drugs and neither did anybody approach him to offer to buy dangerous drugs from him. The second accused, in her defence, submitted that she never saw the contents of the box nor did she ask Safia what the contents were. She denied that Safia was her invention and that they tried to bribe the police
G as alleged. She also denied saying 'kia ba kan nila na' and that she had cried when the drugs were found because she regretted having given permission to the first accused to allow Safia to leave the box with them. By virtue of s. 37(da) of the Act, the accused were presumed to be trafficking in the drugs as the weight was
H almost seven times in excess of the amount specified in subsection 37(da)(xvi). The issues that arose were (1) whether Safia was a real person or a fictitious character that would cause the whole of the defence case to collapse and (2) whether a *prima facie* case had been established against both the accused.

I

Held (convicting the first and second accused of offence charged):

(1) The first and second accused have not produced any evidence to show that they were authorised by law to possess the drugs. They have also failed to explain what their intention was in possessing without lawful authority such large amount of drugs cleverly concealed at the underside of the box, let alone proving that the drugs were not for trafficking. In fact, they made no attempt at all to rebut the presumption of trafficking. The entire defence of the accused was footed on their claim that they knew nothing about the drugs as the box where the drugs were hidden belonged to Safia. In other words, their defence was that they were not in *mens rea* possession of the drugs. Whether or not they had knowledge must be judged from their outward acts or omissions. Having considered their defence carefully and testing them against the prosecution's evidence and the probabilities of the case, the explanations of the accused have failed to cast any reasonable doubt as to their knowledge about the drugs. On the contrary their explanations have strengthened the prosecution's case. There was no logic in the first accused's claim that he had agreed to keep a box for a complete stranger without even asking what the contents were simply because the stranger appeared nice to him. If their suggestion was that they had been framed by Safia, they failed to explain why a total stranger would want to do that. Without a doubt, it was the accused themselves who had an interest in the box. (paras 39, 42 & 44)

(2) Apart from shifting the blame on Safia, the focus of the defence case was to deny and contradict Inspector Willie's and Lance Corporal Karim's evidence concerning their conduct at the time of the raid. The first accused's explanation that he tried to push the door close because he thought the police were gangsters sounded hollow and should be rejected. The reason why he did so was because he knew the police were going after the drugs. The subsequent discovery of the drugs in the room explained his earlier conduct. His act of trying to close the door shut was obviously to prevent the police from coming in and also to give him time to get rid of the drugs. His behaviour after the drugs were discovered was also inconsistent with the behaviour of an innocent man. According to Inspector Willie after the second accused

A shouted in Suluk that the police have found the thing the first accused did not say anything nor did he make any protest. This evidence was not challenged at all and was therefore deemed to be admitted. (paras 41, 45 & 46)

B **(3)** There was no doubt that the first accused's claim was a recent invention conjured up to bolster his defence. The real reason why the first accused did not protest, as any innocent man naturally would in the circumstances, was because he knew all along that there were drugs concealed at the C underside of the box. His silence when the drugs were found was not evidence of his innocence. Rather it was evidence of his resignation to the fact that he had been caught. A victim of circumstances or a frame up would have told the police straight away and vigorously that the box belonged to D someone else. Further, the first accused's attempt to bribe the police after the drugs were discovered fortified the belief that he knew all along that the box contained dangerous drugs. There was no reason for the police to fabricate evidence on this point. The inescapable inference that could be drawn from E the actions and inactions of the first accused was that he knew about the drugs. The claim that the first accused knew nothing about the drugs was rejected. (paras 49 & 50)

(4) As for the second accused, her reaction after the police found F the drugs contradicted her claim that she had no knowledge about the drugs. The second accused's explanation that she cried because she regretted having agreed to keep the box for Safia was hardly convincing. There was no reason for her to cry and embrace the first accused if she knew nothing about G the drugs. All these only pointed to the fact that she knew that what Lance Corporal Karim had found were dangerous drugs. Her conduct was a manifestation of her guilty mind. Further, the second accused had also contradicted herself in two material aspects. Firstly, whereas in her cautioned H statement she said she never saw the contents of the box, in her evidence in court she said she saw Safia taking a black plastic bag from the box. Secondly, whereas in the cautioned statement she said Safia went to her hotel room and left the box there, in her evidence in court she said it was the bell I boy who brought the box in. These were serious contradictions having regard to the nature of her defence. This court was unable to accept her evidence that she knew nothing about the drugs. (paras 51, 52 & 54)

(5) The defence raised the point that two highly incriminating evidence of Inspector Willie and Lance Corporal Karim were not mentioned in the police report and in the prosecution's opening speech: (i) the attempted bribe by the two accused and (ii) the utterance by the second accused that 'they have found the thing.' With due respect, whether or not a particular witness was telling the truth on a particular point was a matter to be decided by the court having regard to the totality of the evidence and the probabilities of the case and not merely on account of any omission in the opening speech or in the police report. In the present case, on the totality of the evidence, this court was not prepared to say that Inspector Willie and Lance Corporal Karim had told lies on the two matters raised. The fact was that a *prima face* case had been established against the accused. The law at the close of the prosecution case was that the evidence produced by the prosecution must be subjected to a maximum evaluation and the witnesses must be found to be credible witnesses. By ordering the accused to enter their defence on the trafficking charge the Court of Appeal must have found the evidence of Inspector Willie and Lance Corporal Karim to be credible in all material respects. (paras 57, 59 & 66)

(6) This court had considered the evidence and the probabilities concerning Safia and was convinced that she was not a real person. It was hard to believe that a stranger en route to Sandakan from the Phillipines would ask another stranger to take care of a box while she was away. No reason was given as to why it was necessary to leave the box with the accused while she was away in Sandakan. This should have aroused the accused's suspicion but surprisingly it did not. The accused came to Kota Kinabalu as tourists, or so they claimed. Yet instead of doing what tourists normally did they were more interested in looking after an empty box. There was nothing improbable in this story by any stretch of the imagination. This story about Safia was nothing but a figment of their imaginations. (paras 76 & 77)

(7) The unmistakable impression from the defence of the first and second accused was that having been caught for trafficking in dangerous drugs they had to try and create a story in the hope that the court would believe it. On the evidence there was no doubt that they were in *mens rea* possession of the

drugs without having to call in aid the presumption of knowledge under s. 37(d) of the Act. This court rejected their explanations on the issue of knowledge. This court was left in no reasonable doubt that the first and second accused were guilty of the offence charged. The prosecution had proved its case beyond reasonable doubt. In the circumstances, the first and second accused were convicted of the offence charged. (paras 81 & 84)

(8) There was only one sentence provided by law for the offence and that was the death sentence. The first and second accused were ordered to be brought to a lawful place where they shall be hanged by the neck until they are dead. (para 85)

[Order accordingly.]

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
AEG Carapiet v. Derderian AIR [1961] Cal 359 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bhagwan Singh v. State of Haryana AIR [1976] SC 202 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Charles Waker Devadas v. State [1993] 3 Crimes 926 (Mad) ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***
Leow Ngee Lim v. Reg [1955] 1 LNS 53 ***(refd)***
Mat v. PP [1963] 1 LNS 82 ***(refd)***
Miller v. Minister of Pensions [1947] All ER 372 ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Ibrahim Mahmud [2001] 3 CLJ 284 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 ***(refd)***
PP v. Subramani [1937] 1 MLJ 57 ***(refd)***
Price v. Menning [1889] 42 Ch D 372 ***(refd)***
R v. Abbott [1955] 2 All ER 899 ***(refd)***
R v. Darby [1989] Cr LR 817 ***(refd)***

Sarasdawathaamma v. Bhad Pamma AIR [1970] Mys 157 ***(refd)***
Teng Boon How v. PP [1993] 4 CLJ 545 SC ***(refd)***
Tulshiram v. RC Pal AIR [1953] Cal 160 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A(1)
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da)(xvi), 39A(2)(r), 39B(1)(a)
Evidence Act 1950, ss. 91, 92
Penal Code, s. 107

For the accused - Datuk Chau Chin Tang (Yong Pei Yee with him); M/s Chau & Thien
For the prosecution - Jamil Aripin; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] The joint charge against the two accused is as follows:

> That you both, on the 11th day of August 2005 at about 10.50 am in room no. 808, 8th Floor, Kinabalu Daya Hotel, Jalan Pantai, in the District of Kota Kinabalu, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 336.66 grams of Methamphetamine and that you both have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act read with Section 34 of the Penal Code.

[2] They claimed trial to the charge before then Justice Ian Chin. At the close of the prosecution case Justice Ian Chin ruled that the prosecution failed to establish a *prima facie* case against both of them and accordingly acquitted them of the charge. He however called upon both accused to answer a charge under s. 12(2) read with s. 39A(2)(r) of the Dangerous Drugs Act 1952 (the Act). The accused pleaded not guilty to the amended charge and gave evidence on oath. At the conclusion of the trial Justice Ian Chin found both of them guilty and sentenced each of them to life imprisonment. The 1st accused was additionally sentenced to ten strokes of the rotan.

[3] The Public Prosecutor appealed against the order of acquittal in respect of the trafficking charge. The appeal was allowed by the Court of Appeal on 27 November 2007 and both accused were ordered to enter their defence on the original trafficking charge. By the time the defence case came up for hearing the trial had been taken over by me. Justice Ian Chin has since left the judiciary.

[4] By calling upon the accused to enter their defence on the original trafficking charge the Court of Appeal must have been satisfied that both accused were in *mens rea* possession of the drugs and that therefore the presumption of trafficking under s. 37(da)(xvi) of the Act applies against them.

[5] At the conclusion of the trial it is incumbent on this court to consider all the evidence before it and to decide whether the prosecution has proved its case beyond reasonable doubt: see s. 182A (1) of the Criminal Procedure Code. If, upon a review of the whole evidence there is a reasonable doubt as to the guilt of the accused, they must be acquitted: see *PP v. Ibrahim Mahmud* [2001] 3 CLJ 284. In *Balachandran v. PP* [2005] 1 CLJ 85 Augustine Paul JCA (as he then was) said that a case is said to have been proved beyond reasonable doubt only upon a consideration of all the evidence adduced.

[6] Before I deal with the defence case I shall first deal with the prosecution evidence. It is necessary to set out the facts in some detail as they are relevant to show the state of mind of the accused persons. In doing so I am of course relying entirely on the printed notes of evidence without the benefit of seeing the witnesses while they gave evidence as their testimonies were taken before Justice Ian Chin.

[7] The salient facts are as follows. On 11 August 2005 at about 10.50am Inspector Willie anak Nunot (Inspector Willie) led a team of five police officers to conduct a raid at room 808 on the 8th floor of the Kinabalu Daya Hotel, Kota Kinabalu. They had earlier received information that drug trafficking activity was taking place at the hotel.

[8] On arrival at the hotel they enlisted the assistance of a hotel maid to get the occupants of room 808 to open the door. When the door was opened by the 1st accused Inspector Willie introduced himself as a police officer. On hearing this the 1st accused tried to push back the door but the police team managed to keep it open. Inspector Willie and his team then entered the

room. There were only two occupants inside, namely the 1st and the 2nd accused who were husband and wife. Both are citizens of the Phillipines.

[9] Inspector Willie proceeded to conduct a body search on the 1st accused but nothing incriminating was found on him. The room was also searched but nothing incriminating was found. Then Lance Corporal Karim Bin Evin (Lance Corporal Karim) found a box bearing the label "Sky Flakes Crackers" on the floor of the room. It was in an opened state and a pair of sports shoes and three pairs of lady sandals were inside. Inspector Willie asked the 1st accused whose shoes were they and the 1st accused replied they belonged to the 2nd accused.

[10] Lance Corporal Karim took out all the shoes and sandals from the box and found nothing else inside. However when he continued to examine the box he saw something suspicious at the underside of the box. He tore the box from inside a little bit and noticed a translucent plastic bag containing white crystalline substances. He then turned over the box and tore the bottom where he found nine plastic packets containing white crystalline substances suspected to be dangerous drugs. According to Inspector Willie if the box had not been torn they would not have been able to see the nine plastic packets. It is obvious that the drugs were cleverly concealed at the underside of the box.

[11] Inspector Willie testified that before the drugs were found the two accused looked panicky but did not say anything. But as soon as the drugs were found the 2nd accused shouted and embraced the 1st accused and said in Suluk (a Filipino dialect) that the police had found the thing. The actual Suluk words uttered by the 2nd accused were "Kia ba kan nila na" which means "the things have been found". This was interpreted to Inspector Willie by Lance Corporal Karim who was fluent in Suluk. Neither the 1st accused nor the 2nd accused protested when the drugs were discovered. The 2nd accused merely cried and embraced the 1st accused. Lance Corporal Karim further testified that when he was examining the box the two accused were constantly looking at it.

[12] After the accused were handcuffed to each other's hands they tried to bribe the police by offering to pay them any amount if they were freed on that day and not brought to the police station. However Inspector Willie did not entertain the request but instead told the 1st accused that the case would be investigated.

[13] The nine plastic packets were then seized and brought back to the police station. At the police station Inspector Willie made a thorough inspection of the box. He found that the bottom part had been modified by adding another piece of paper board just above the bottom flaps and this piece of paper board was glued all round to the underside of the box. The nine plastic packets were found between the added piece of board and the bottom flaps.

[14] The suspected drugs were sent to the chemistry department for analysis and confirmed to contain 336.66 grammes of methamphetamine, a dangerous drug listed in Part III of the First Schedule to the Act.

[15] In his defence the first accused chose to give evidence on oath. In essence his defence is that he knew nothing about the drugs as the box belonged to a stranger who asked him to keep it temporarily. His testimony is that on 6 August 2005 he and the 2nd accused arrived at the Kota Kinabalu airport from Manila. While he was paying the taxi fare at the ticketing counter at the airport a fellow Filipina by the name of Safia approached him and asked whether she could come with them and he agreed. When told by the accused that they intended to stay at Capital Hotel Safia suggested that they stayed at Kinabalu Daya Hotel as the rate was cheaper. So they proceeded to Kinabalu Daya Hotel but unfortunately the hotel was fully booked. They then proceeded on foot to Capital Hotel and checked in at the hotel. Safia did not check in but asked the 1st accused to keep the box for her as she had to go to Sandakan. She told the 1st accused that she would be back to take the box. The 1st accused agreed. According to him he did not suspect that the box contained any dangerous drug.

[16] The 1st accused further testified that they only stayed at Capital Hotel for two days and checked out on 8 August 2005 as they could not afford the rental. They then checked in at Kinabalu Daya Hotel at 12pm on the same day. They were given

room 808 on the 8th floor. After checking in they went out for lunch. It was at this time that Safia came and asked for the box. The three of them then went up to room 808 where Safia opened the seal of the box and took out a black plastic bag. After taking out the black plastic bag she left the room. According to the 1st accused he asked Safia to take the box with her but Safia told him she would come back later to take it. The 1st accused added that after Safia took out the plastic bag the box was empty. The 2nd accused then used the box to keep her shoes.

[17] The 1st accused testified that during their entire stay at both hotels, he never approached anybody to negotiate any sale of drugs and neither did anybody approach him to offer to buy dangerous drugs from him.

[18] As for the reason why he tried to push the door close after Inspector Willie introduced himself as a police officer his explanation is that he thought Inspector Willie and his team were gangsters doubling up as police officers. When asked in examination in chief if it is true that the 2nd accused said to him the police had found the drugs as claimed by Lance Corporal Karim the 1st accused said Lance Corporal Karim was lying. According to him what the 2nd accused actually said was "I told you not to help Safia to keep the box." She said this because she had earlier reminded him not to help Safia keep the box. The 1st accused also denied Lance Corporal Karim's allegation that they tried to bribe the police after the drugs were found.

[19] When asked in cross examination whether he protested when the drugs were found the 1st accused said he did inform Lans Corporal Karim that he did not know that there were drugs concealed underneath the box. He denied that Safia is a fictitious character as suggested by the prosecution.

[20] The 1st accused is also relying on his cautioned statement (D1) to support his case. Basically what he said in his cautioned statement is similar to what he said in court except for one major difference. In the cautioned statement he said the box contained jewelleries but in court he said it contained a black plastic bag.

[21] The 2nd accused also chose to give evidence under oath. She began by producing her cautioned statement (D2). The material part of her cautioned statement for purposes of her defence is that she never saw the contents of the box nor did she

ask Safia what the contents were. Her testimony in court on what happened after the police entered room 808 is as follows. After entering the room the police searched the room and said they were looking for something and kept on searching but found nothing. Then Lance Corporal Karim made a telephone call after which he spoke in Suluk, saying "we found it." She said she was shocked and asked the 1st accused what happened. She then began to cry and told the 1st accused that they should not have helped Safia keep the box.

[22] She denied that Safia was her invention and that they tried to bribe the police as alleged. She also denied saying "kia ba kan nila na" as claimed by Lance Corporal Karim. She said she would not have allowed Safia to leave the box in the room if she had suspected that it contained drugs. She said she only met Safia twice, once at the airport and the other time at Kinabalu Daya Hotel. However on being reminded by counsel that the 1st accused in his testimony had said that Safia followed them to Capital Hotel she changed her story somewhat and now said that the last time she saw Safia was when she came to Kinabalu Daya Hotel to take out the black plastic bag.

[23] In cross examination she denied that she and the 1st accused did not protest when the drugs were found. She did not say however what was it that they protested. When asked who brought the box to the room at Capital Hotel she said it was the hotel bell boy. She testified that when Safia took away only the contents of the box and not the box itself she asked the 1st accused why Safia did not take the box with her. The 1st accused's reply was that Safia would come back to take the box. She confirmed that she cried when the drugs were found but that according to her was because she regretted having given permission to the 1st accused to allow Safia to leave the box with them. She said the 1st accused did mention to the police that the drugs did not belong to them.

[24] By virtue of s. 37(da) of the Act the accused are presumed to be trafficking in the drugs as the weight is almost seven times in excess of the amount specified in subsection 37(da)(xvi) which provides:

(da) any person who is found in possession of:

(xvi) 50 grammes or more in weight of Methamphetamine;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[25] The offence of trafficking is created by s. 39B(1) of the Act in the following terms:

39B(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia:

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

[26] "Dangerous drug" is defined by s. 2 of the Act to mean any drug or substance which is for the time being comprised in the First Schedule of the Act.

[27] The word "traffic" in s. 39B(1)(a) of the Act is not defined but s. 2 provides that "trafficking" includes the doing of any of the following acts, namely manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, and distributing.

[28] It is significant to note that the word "possessing" is conspicuously missing from the above definition of "trafficking".

[29] It must also be noted that the doing of any of the above acts is only an act of trafficking if done without the authority of the Act or the regulations made thereunder. The same goes with the presumption of trafficking under s. 37(da) of the Act. It only applies if the possession is otherwise than in accordance with the authority of the Act or any other written law.

[30] There is no reference to weight in s. 2. Read in isolation and in the wrong context this can be interpreted to mean that irrespective of the weight of the drug anyone who does any of the specified acts is doing an act of trafficking and therefore guilty an offence under s. 39B(1)(a) of the Act. This construction will of course lead to an absurdity and will be oppressive to the accused

as it is inconceivable that a person who is found keeping (an act of trafficking by definition) a very small amount of dangerous drug for his own personal consumption (possession by an addict for instance) is guilty of the offence under s. 39B(1)(a) and be punished with the extreme penalty of death. That cannot be the intention of Parliament.

[31] The underlying object behind s. 39B(1) of the Act must surely be to prohibit the distribution of dangerous drugs for profit or other insidious motives and not mere passive possession for one's own consumption. Its aim is to fatally strike at pedlars of death who have caused and continue to cause untold misery to families who have the misfortune of having had one or more of their members fall into their death traps. It is not aimed at their victims, the addicts.

[32] By presuming trafficking only where the weight reaches or exceeds the amount specified in s. 37(da) of the Act Parliament must have intended that possession is only trafficking if the weight of the drug comes within the specified amount except in cases where it can be shown that the possession is undoubtedly for the purpose of trafficking and not for the accused's own consumption in which case weight becomes irrelevant and the accused is guilty of the offence of trafficking. In such cases the nature of the act determines the offence, not the weight. An example would be where the accused is proved to have been involved in the activity of selling dangerous drugs.

[33] Section 37(da) is only a presumption but it reflects Parliament's intention to draw a line between the offence of trafficking and the offence of possession. In my view this construction will not do violence to s. 2 of the Act as the distinction is recognised by the Act itself. The offence of trafficking necessarily involves the offence of possession but the reverse is not necessarily true. In *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 the Court of Appeal stated that the general definition of trafficking in s. 2 of the Act is subject to the context of the particular case.

[34] In my view trafficking for the purpose of s. 39B(1) involves an intention to transfer possession to another person. Lord Diplock illustrated the point when he said in *Ong Ah Chuan v. PP* [1980] 1 LNS 181:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and 'trafficking' in section 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself.

[35] What does the presumption of trafficking under s. 37(da) of the Act entail? What is it that the accused must prove to rebut the presumption? The answer lies in the fact that the accused himself knows best what he intends to do with the drug. This is a matter within his special knowledge.

[36] Whether the elements of trafficking had been made out depends on the facts of each particular case: see *Chow Kok Keong v. PP* [1998] 2 CLJ 469. In this connection what Lord Diplock said in *Ong Ah Chuan*, in the passage quoted below is pertinent:

> Whether the quantity involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

[37] It is not for the prosecution to prove what he intended to do with the drug at the time of his arrest. The law presumes that it is for trafficking. If the accused succeeds in proving for instance that the drug was solely for his own personal consumption, a defence which might be available to the accused as decided by the Supreme Court in *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18, then the burden of proof under s. 37(da) of the Act is discharged and he is only guilty of the offence of possession without lawful authority under s. 12(2) of the Act but not trafficking.

[38] The accused is also entitled to be acquitted of the trafficking charge if he can show that he was merely in possession of the drug and that the real trafficker is someone else: see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311.

A I would add that if this is the defence that he is putting up he must further show that he was not an abettor within the meaning of s. 107 of the Penal Code. Abetment it will be noted is an offence by itself under s. 33 of the Act. The punishment for the abetment of an offence under s. 39B(1) is also death.

B

[39] In the instant case the 1st and 2nd accused have not produced any evidence to show that they were authorized by law to possess the drugs. They have also failed to explain what their intention was in possessing without lawful authority such large C amount of drugs cleverly concealed at the underside of the box, let alone proving that the drugs were not for trafficking. In fact they made no attempt at all to rebut the presumption of trafficking. I have considered their explanations carefully to see if it is possible that their common intention was not unlawful. I find D no justification to warrant such finding.

[40] The fact that the 1st accused did not approach anyone to negotiate any sale of drugs as claimed by him even if true is insufficient to rebut the presumption. Such bare assertion must be considered in the context of his defence, which is the defence of E no knowledge.

[41] The accused are still entitled to acquittal if they succeeded in casting a reasonable doubt in the prosecution's case on the question of knowledge. What the court has to decide is whether F their explanations might reasonably be true: see *Teng Boon How v. PP* [1993] 4 CLJ 545. The entire defence of the accused is footed on their claim that they knew nothing about the drugs as the box where the drugs were hidden belonged to Safia. In other words their defence is that they were not in *mens rea* possession of the G drugs, not that they were not trafficking in the drugs. Whether or not they had knowledge must be judged from their outward acts or omissions: see *PP v. Badrulsham bin Baharom* [1987] 1 LNS 72.

[42] Having considered their defence carefully and testing them H against the prosecution's evidence and the probabilities of the case I find that their explanations have failed to cast any reasonable doubt in my mind as to their knowledge about the drugs. On the contrary their explanations have strengthened the prosecution's case. Their defence is based on an incredible story. I find no logic I in the 1st accused's claim that he had agreed to keep a box for a complete stranger without even asking what the contents were simply because the stranger appeared nice to him.

[43] The first time the box was left with him was at Capital Hotel. When Safia came back two days later and took out a black plastic bag from the box he again agreed to keep the box which by now was empty. He claimed that he asked Safia to take away the empty box but was told by Safia that she would be back for the box and he readily agreed. There is no semblance of truth in this story. The 1st accused is not as naive as he tries to make himself out to be. I have seen him giving evidence in court. His answers in cross examination were measured and calculative and he is certainly not a person with low IQ. Judging from his personality he is certainly not someone who could easily be made use of by anyone, least of all by a total stranger who asked for favour to keep an empty paper box.

[44] His claim that Safia told him she would be back for the empty box is ridiculous. Why would anyone bother to collect an empty box? What the 1st accused is trying to suggest is that Safia's interest was not in the box but in the drugs concealed in the box. This is highly improbable because no one would risk losing such valuable thing by leaving them to a total stranger for two days. If their suggestion is that they had been framed by Safia they failed to explain why a total stranger would want to do that. I have no doubt that it was the accused themselves who had an interest in the box.

[45] Apart from shifting the blame on Safia the focus of the defence case was to deny and contradict Inspector Willie's and Lance Corporal Karim's evidence concerning their conduct at the time of the raid. The 1st accused's explanation that he tried to push the door close because he thought the police were gangsters sounds hollow to me and I have no hesitation in rejecting it. In my view the reason why he did so was because he knew the police were going after the drugs. The subsequent discovery of the drugs in the room explains his earlier conduct. His act of trying to close the door shut was obviously to prevent the police from coming in and also to give him time to get rid of the drugs.

[46] His behaviour after the drugs were discovered is also inconsistent with the behaviour of an innocent man. According to Inspector Willie after the 2nd accused shouted in Suluk that the police have found the thing the 1st accused did not say anything nor did he make any protest. This evidence was not challenged at

all in cross examination and is therefore deemed to be admitted: see *Wong Swee Chin v. PP* [1980] 1 LNS 138; *Browne v. Dunn* [1893] 6 R 67.

[47] The 1st accused claimed that he did tell Lance Corporal Karim that he did not know about the drugs concealed in the box. But this material part of the defence case was never put to Lance Corporal Karim. Neither was it put to Inspector Willie. On this point suffice for me to cite the oft-quoted observation of Mukharji J in *AEG Carapiet v. Derderian* AIR [1961] Cal 359 where he said:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice.

[48] However failure on the part of the accused to put its case as aforesaid can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond all reasonable doubt: see *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 per Edgar Joseph Jr FCJ.

[49] I have no doubt that the 1st accused's claim is a recent invention conjured up to bolster his defence. In my view the real reason why the 1st accused did not protest, as any innocent man naturally would in the circumstances, is because he knew all along that there were drugs concealed at the underside of the box. His silence when the drugs were found is not evidence of his innocence. Rather it is evidence of his resignation to the fact that he had been caught. If indeed he was innocent he would have protested his innocence at the first available opportunity. That would be the natural reaction of an innocent man. Instead both he and the 2nd accused kept quiet when the inspection of the box was being carried out. A victim of circumstances or a frame up would have told the police straight away and vigorously that the box belonged to someone else. After all they knew what the police were there for.

[50] The 1st accused's attempt to bribe the police after the drugs were discovered fortifies my belief that he knew all along that the box contained dangerous drugs. There is no reason for the police to fabricate evidence on this point. The inescapable

inference that can be drawn from the 1st accused's actions and inactions is that he knew about the drugs. I reject his claim that he knew nothing about the drugs.

[51] As for the 2nd accused her reaction after the police found the drugs contradicts her claim that she had no knowledge about the drugs. Her evidence is that when Lance Corporal Karim said they have "found it" she was shocked and asked the 1st accused what happened and began to cry. Now, the question that immediately comes to mind is what was there to be shocked about if she did not know what was it that Lance Corporal Karim had found?

[52] Her explanation that she cried because she regretted having agreed to keep the box for Safia is hardly convincing. There was no reason for her to cry and embrace the 1st accused if she knew nothing about the drugs. All these only point to the fact that she knew that what Lance Corporal Karim had found were dangerous drugs. Her conduct is a manifestation of her guilty mind. I am inclined to believe that she reacted the way she did because she did not expect the police to find the drugs or at least she was hoping that the police would not find them. Thus it came as a shock to her when the police did.

[53] I have seen her giving evidence and I must place on record that I do not find her to be an impressive witness at all. From my observation she appeared to be trying too hard to remember what she had to say in court and was careful not to give "wrong" answers which may implicate her and the 1st accused. There were many occasions during cross examination when she appeared to be looking around for answers and hoping that someone in court would provide her with the answers.

[54] Her claim that when the drug was discovered Lance Corporal Karim said "we found it" was not put to Lance Corporal Karim in cross examination. Therefore I do not give any weight to this part of her evidence. She had also contradicted herself in two material respects. Firstly, whereas in her cautioned statement she said she never saw the contents of the box, in her evidence in court she said she saw Safia taking a black plastic bag from the box. Secondly, whereas in the cautioned statement she said Safia went to their hotel room and left the box there, in her evidence in court she said it was the bell boy who brought the box in.

A These are serious contradictions having regard to the nature of her defence. The fact that she used the box to keep her shoes is indicative of an intention to camouflage her real intention. I am unable to accept her evidence that she knew nothing about the drugs.

B

[55] Learned counsel submitted that the prosecution has not proven exclusivity of possession and that therefore both accused must be acquitted of the charge. For the proposition he relied on *R v. Abbott* [1955] 2 All ER 899; *Abdullah Zawawi Yusoff v. PP* C [1993] 4 CLJ 1; *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43. The answer to learned counsel's submission is the recent decision of the Federal Court in *PP v. Denish Madhavan* [2009] 2 CLJ 209 where the court said at p. 217:

D

> It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where E possession is entirely with one person – that is, "exclusive" – that a conviction is possible.

[56] The Federal Court had earlier in the judgment cited with approval the following passages in *Leow Ngee Lim v. Reg* [1955] 1 LNS 53:

F

> It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession G means that the possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The H statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[57] Learned counsel also pointed out that two highly I incriminating evidence of Inspector Willie and Lance Corporal Karim were not mentioned in the police report (P12) and in the prosecution's opening speech. The first is the attempted bribe by

the two accused and the second is the utterance by the 2nd accused that "they have found the thing." According to learned counsel the fact that they were not mentioned in the opening speech and in the police report shows that Inspector Willie and Lance Corporal Karim were not telling the truth and had fabricated evidence.

[58] With due respect I am unable to accede to learned counsel's submission. Whether or not a particular witness is telling the truth on a particular point is a matter to be decided by the court having regard to the totality of the evidence and the probabilities of the case and not merely on account of any omission in the opening speech or in the police report. It is axiomatic that a case must be decided based on evidence produced before the court and nothing else. The opening speech is not evidence and cannot be used to attack the credibility of a witness called by the prosecution unless it can be shown that the omission was motivated by a desire to subvert the course of justice.

[59] In the present case on the totality of the evidence before the court I am not prepared to say that Inspector Willie and Lance Corporal Karim had told lies on the two matters raised by learned counsel. The attempted bribe it will be noted was made to Inspector Willie through the interpretation of Lance Corporal Karim but Lance Corporal Karim's evidence on this point was not challenged at all in cross examination.

[60] As for the police report it is only a brief account of what transpired at the time of the offence. It is a formal process to put the wheel of investigation in motion. Of course the police report must contain the truth but an omission, *ipso facto*, cannot be the basis of acquittal. If it were otherwise then cases will be decided based on the contents of police reports rather than on the evidence of witnesses. It cannot be a correct proposition of law to say that a witness cannot say anything beyond what he has said in his police report.

[61] It may be argued that a distinction has to be drawn between an omission made by an ordinary member of the public and an omission made by a senior police officer like Inspector Willie but in my view any omission by any witness on any material matter must be subjected to the same rule and that is, his evidence must pass the test of credibility having regard to the totality of the evidence and the probabilities of the case.

[62] Statements made out of court, including police reports are relevant if they relate to the issues being tried but it must be appreciated that they do not represent the whole truth. The authorities cited by learned counsel do not in my view support his argument.

[63] It is relevant to note that Inspector Willie was not confronted with the omissions in his police report. If the defence had serious objections to the impugned evidence of Inspector Willie the omissions should have been brought to his attention while he was still in the witness box. It is against the principle of fair play to attack the evidence of a witness during submissions when the witness no longer has the opportunity to defend his evidence.

[64] While it is true that the defence has no duty to supplement any infirmity in the prosecution case it is also true in my view that if the defence wishes the court to reject the evidence of a particular witness on the ground that his evidence is a fabrication due to an omission in his previous statement the witness must at least be confronted with such omission while he was still in the witness box.

[65] Further I am of the view that the police report is not a document that falls within the purview of ss. 91 and 92 of the Evidence Act 1950. For these provisions to apply there has to be a law to require the report to be reduced to the form of a document. Learned counsel has not cited any law that provides to that effect.

[66] In any event even if there is force in learned counsel's submission on this point, the fact is a *prima facie* case had been established against the accused. The law at the close of the prosecution case is that the evidence produced by the prosecution must be subjected to a maximum evaluation and the witnesses must be found to be credible witnesses. By ordering the accused to enter their defence on the trafficking charge the Court of Appeal must have found the evidence of Inspector Willie and Lance Corporal Karim to be credible in all material respects. The omissions in the opening speech and the police report could not have escaped their attention. It is to be noted that the same counsel appeared for the accused in the Court of Appeal.

[67] It is necessary for me to deal with the testimonies of the two police witnesses called by the defence. They are the third and fourth defence witnesses. The third witness is Corporal Muda bin Madawan (Corporal Muda). He was a member of the raiding party and a prosecution witness but offered to the defence at the close of the prosecution case. Not surprisingly his evidence leaned heavily towards the prosecution as his examination in chief progressed. As a result learned counsel applied to impeach his credit on the basis that his evidence contradicted his statement which he gave to counsel's assistant Miss Yong Pei Yee on a date no one could say for certain but before he gave evidence in court.

[68] Having found that the contradictions were material I allowed counsel's application. At the conclusion of the trial I have considered his evidence in court and his statement to Miss Yong Pei Yee and I find that he has failed to explain away the contradictions. His credit is therefore impeached. It is true that not all his evidence are lies but in my view when the credit of a witness is impeached his credibility is reduced to zero. In any event it is wholly unsafe to rely on the evidence of a witness who has given conflicting evidence on material particulars, more so in a case involving the capital punishment. The contradictions show a callous disregard for truth.

[69] The fourth witness called by the defence was another member of the raiding party. He is Constable Muhamed Janid b. Ramli (Constable Muhamed). Learned counsel chose not to mount impeachment proceedings against him but instead urged the court to treat him as a hostile witness. Therefore the defence case against this witness stands on a different footing than their case against Corporal Muda. It is on this basis that I approached Constable Muhamed's evidence.

[70] A hostile witness is one who in the opinion of the judge shows no desire to tell the truth at the instant of the party calling him and to whom he may display a hostile *animus*: see *R v. Darby* [1989] Cr. LR 817. The question whether a witness is hostile is for the judge alone to decide and the court will decide whether a hostile witness should be treated as creditworthy at all: see *Price v. Menning* [1889] 42 Ch. D 372; *PP v. Subramani* [1937] 1 MLJ 57.

[71] Having allowed counsel's application to treat him as a hostile witness which means learned counsel was allowed to cross examine his own witness I have paid particular attention to Constable Muhamed's demeanour and manner while giving evidence. My impression of this witness is that although he was visibly nervous when confronted with the earlier statement he gave to Miss Yong Pei Yee which is inconsistent with his evidence in court I do not find him to be a wholly dishonest witness unworthy of any credit. I find no sufficient reason to reject the whole of his evidence even though he was hostile to the defence. The court can still rely on parts of his evidence if the court is satisfied that they are the truth: see *Charles Waker Devadas v. State* [1993] 3 Crimes 926 (Mad); *Tulshiram v. RC* Pal AIR [1953] Cal. 160; *Sarasdawathaamma v. Bhad Pamma* AIR [1970] Mys. 157; *Bhagwan Singh v. State of Haryana* AIR [1976] SC 202.

[72] Constable Muhamed's evidence by and large is consistent with the evidence of Inspector Willie and Lance Corporal Karim. He confirmed their evidence that when the drugs were discovered the 2nd accused embraced her husband and cried. He also confirmed that the 1st and 2nd accused talked to Inspector Willie and that the conversation between them was interpreted by Lance Corporal Karim.

[73] With regard to Inspector Willie's evidence that the accused tried to bribe them Constable Muhamed testified that Inspector Willie did tell him about it. I have no reason to disbelieve him on these points. In any event even without his testimony the prosecution's evidence is sufficient to establish the matters that he testified on.

[74] I shall now deal with the evidence pertaining to "Safia" the mysterious stranger who allegedly asked the 1st and 2nd accused to keep the box for her while she was away in Sandakan. For obvious reasons she featured prominently in the testimonies of both the 1st and the 2nd accused. Was she the actual trafficker and the accused mere possessors? The question is whether Safia is a real person or a red herring. If she is proven to be a fictitious character then the whole of the defence case will collapse to the ground.

[75] To begin with it is not the defence case that Safia was the real trafficker and that the accused were mere possessors of the drugs. Their defence is lack of knowledge. It is a complete defence in the sense that if they succeeded they are not only entitled to be acquitted of the trafficking charge but are also entitled to be acquitted of all offence under the Act.

[76] I have considered the evidence and the probabilities concerning Safia and I am convinced that she is not a real person. It is hard to believe that a stranger en route to Sandakan from the Phillipines would ask another stranger to take care of a box while she was away. No reason was given as to why it was necessary to leave the box with the accused while she was away in Sandakan. This should have aroused the accuseds' suspicion but surprisingly it did not. Upon her return to Kota Kinabalu from Sandakan two days later Safia took out the contents of the box which according to the accused was a black plastic bag, after which she left the hotel and the empty box. Again she told the accused that she would be back for the empty box. Again the accused agreed to look after the box. One has to be a genius three times over to understand the logic behind this whole exercise.

[77] The accused came to Kota Kinabalu as tourists, or so they claimed. Yet instead of doing what tourists normally do they were more interested in looking after an empty box! There is nothing probable in this story by any stretch of the imagination. This story about Safia is nothing but a figment of their imaginations.

[78] The existence of Safia becomes more of an illusion if one were to compare the 1st accused's explanation in court with the explanation he gave to the police in his cautioned statement. In the cautioned statement he said that when Safia opened the box at Kinabalu Daya Hotel he saw only jewelleries inside the box. His evidence in court is different. He said he saw a black plastic bag inside the box.

[79] There is a world of difference between jewelleries and a black plastic bag. To my mind the discrepancy is not due to memory lapse or genuine mistake. Rather the discrepancy is because he had invented a new story since giving the cautioned statement.

[80] The learned DPP has referred to the relevant parts of the evidence of the two accused at the previous hearing before Justice Ian Chin to support his contention that the accused are not witnesses of truth. I do not find any necessity to deal with those evidence.

[81] The unmistakable impression I get from the defence of the 1st and 2nd accused is that having been caught for trafficking in dangerous drugs they have to try to create a story in the hope that the court will believe it. On the evidence there is no doubt that they were in *mens rea* possession of the drugs without having to call in aid the presumption of knowledge under s. 37(d) of the Act. I reject their explanations on the issue of knowledge.

[82] This does not mean however that I must enter convictions against them for I still have to consider whether their explanations though rejected have raised a reasonable doubt in my mind as to their guilt. The prosecution would fail to satisfy the onus of proof which lies upon it if on the whole of the evidence I am left in a real state of doubt as to their guilt: see *Mat v. PP* [1963] 1 LNS 82; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. On the degree of proof required to establish a case beyond reasonable doubt Lord Denning in *Miller v. Minister of Pensions* [1947] All ER 372 provided the following answer:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[83] In *PP v. Saimin & Ors* [1971] 1 LNS 115 Sharma J spoke in similar vein when he said:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is the state of the case which after the entire comparison and consideration of all the evidence leaves the mind of the juror in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[84] In simple language the court can only convict the accused if having considered the whole evidence the court is sure that the accused is guilty of the offence charged. If the court is less than sure of the accused's guilt then the case is not proved beyond reasonable doubt for then there would be a lingering doubt in the court's mind as to his guilt. In this regard I am left in no reasonable doubt that the 1st and 2nd accused are guilty of the offence charged. I am satisfied that the prosecution has proved its case beyond reasonable doubt. In the circumstances the 1st and 2nd accused are convicted of the offence charged.

[85] There is only one sentence provided by law for the offence and that is the death sentence. I order that the 1st and 2nd accused be brought to a lawful place where they shall be hanged by the neck until they are dead.